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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-278

THOMAS C. McCAIN, ERNEST WILLIAMS and WILLIAM SPENCER, individually and on behalf of all those similarly situated,

Petitioners,

v.

CHARLES E. LYBRAND, GENE HUIET, HENRY M. HERLONG, ROY A. HARLING, and W. T. TIMMERMAN, individually and as members of the County Council of Edgefield County; NORMAN DORN, JOHN S. EDWARDS and RICHARD A. BEALS, individually and as members of the Board of Election Commissioners of Edgefield County, South Carolina; and J. M. PENDARVIS, individually and as President of the Executive Committee of the Democratic Party of Edgefield County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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THOMAS C. McCAIN, ERNEST WILLIAMS and WILLIAM SPENCER, individually and on behalf of all those similarly situated,

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CHARLES E. LYBRAND, GENE HUIET, HENRY M. HERLONG, ROY A. HARLING, and W. T. TIMMERMAN, individually and as members of the County Council of Edgefield County; NORMAN DORN, JOHN S. EDWARDS and RICHARD A. BEALS, individually and as members of the Board of Election Commissioners of Edgefield County, South Carolina; and J. M. PENDARVIS, individually and as President of the Executive Committee of the Democratic Party of Edgefield County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-styled case on June 17, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is set out in the Appendix, *infra* at 1a. The opinion of the district court dated May 14, 1974, is reported at 376 F. Supp. 304, and is set out in the Appendix, *infra* at 12a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 17, 1974. This court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

1. Whether a county apportionment scheme containing residence districts for candidates coupled with at-large voting is constitutional where there is a maximum deviation among districts of 72 percent and that deviation is not justified by any governmental interest.

STATE STATUTORY PROVISION INVOLVED

Section 14-1850(3), Code of Laws of South Carolina, 1962, as amended:

> There is hereby created the Edgefield County Council (Council) which shall be composed of five members who shall be elected in each general election to serve for terms of two years and until their successors are elected and qualify. One member with the largest plurality shall be elected by the county at large from each of the five districts of the county.

STATEMENT OF THE CASE

Petitioners challenge the apportionment plan for the County Council of Edgefield County, South Carolina.[1] The council is elected by at-large vote of the entire county, but each of its five members must reside in different residential districts. The residential districts range in size from 4,376 to 2,102 people. The county population is 15,692; thus the ideal district size is 3,138 people. The total deviation from the ideal between the largest and smallest districts is 72 percent.[2] A majority of the council is elected from districts containing approximately 44 percent of the population, *i.e.*, Districts 2, 4 and 5.

Petitioners include residents and qualified voters of the two largest districts. The respondents are the members of the county council, the members of the county board of election commissioners, which conducts all general and special elections in the county, and the president of the executive committee of the Democratic Party of Edgefield County, which conducts Democratic Party primary elections in the county. The county council has general governmental powers

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[1] For the purposes of opinion this case was treated together in both the district court and the court of appeals with Robert Lytle v. Commissioners of Election of Union County, a suit to reapportion the governing body of Union County, South Carolina. This petition, however, is filed only on behalf of the plaintiffs in Edgefield County.

[2]

	Population	*Deviation*
District 1	4,367	+39.2%
District 2	2,515	−19.8%
District 3	4,376	+39.5%
District 4	2,332	−25.7%
District 5	2,102	−33.0%

The ratio of smallest to largest district is 1:2.08.

of a local governing body under §14-1850, Code of Laws of South Carolina, 1962, as amended.

Petitioners allege that the holding of elections under the unequal district plan violated their rights and those of individuals similarly situated under the first amendment and due process and equal protection clauses of the fourteenth amendment of the Constitution of the United States.[3] The district court granted petitioners' motion for summary judgment on May 15, 1974, after finding that the districts were substantially of "unequal population" and were not justified by "legitimate political goals" or "rational and compelling circumstances." Appendix, *infra* at 29a. The Court enjoined the holding of future elections pursuant to the challenged residency provision. It allowed the 1974 elections to be held at large with no residency requirement and directed the respondents to file a reapportionment plan with the court by May 1, 1974, such plan to be approved prior to filing by the Attorney General of the United States under the Voting Rights Act of 1965, 42 U.S.C. §1973c.

The respondents appealed and on June 17, 1974, the court of appeals reversed the order of the district court

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[3] The complaint also alleged that the apportionment plan diluted the relative strength of the class of black voters in Edgefield County. Both sides filed motions for summary judgment. Since petitioners' motion was granted as to the unequal population claim, there was no need for either the district court or the court of appeals to reach the dilution issue. This Court has jurisdiction over the issues presented in this petition. United States v. General Motors Corp., 323 U.S. 373 (1945); Hanover Star Milling Co. v. Metcalf, 240 U.S. 403 (1916); Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Brady v. Maryland, 373 U.S. 83 (1963); and American Construction Co. v. Jacksonville, T.& K.W.R. Co., 148 U.S. 372 (1893).

on the grounds that the population variances among districts were not unconstitutional.

Jurisdiction in the district court was based on 28 U.S.C. §1343 and the cause of action predicated on 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to resolve an important question concerning the proper application of the one-man one-vote principle to the apportionment of county governing bodies.

The court of appeals ruled in effect that a deviation among residential districts of 72 percent where coupled with at-large voting for the election of the Edgefield County Council required no justification.[4] *Cf. Gaffney v. Cummings*, 412 U.S. 735 (1973) (dissenting opinion of Mr. Justice Brennan), and *White v. Regester*, 412 U.S. 755 (1973). The circuit court alluded in a general way to the "proper balancing of interests," Appendix, *infra* at 10a, which it felt the Edgefield plan contained but it never stated in the context of the Edgefield plan what those interests precisely were, how they were accommodated or balanced by the plan or indeed if they actually played any role in its formulation. The conclusions of the district court, a court intimately familiar with the governmental structure of South Carolina counties, that there were no rational or compelling circumstances or any legitimate political goals

[4] The court described the disparities in the companion case, Lytle v. Commissioners of Election of Union County, as "substantial," but found those involved here to be "not the wide disparity in population among the districts as was the case in Union County." Appendix, *infra* at 10a.

justifying the deviations among districts, Appendix, *infra* at 29a, were ignored, the circuit court concluding that the deviations required no justification. The mere existence of urban and rural areas in a county should not render the issue of population deviation of the magnitude involved here non-justiciable. *Gaffney v. Cummings, supra.* To so hold is to countenance the kind of invidious discrimination condemned in *Reynolds v. Sims,* 377 U.S. 533 (1964).

2. Certiorari should be granted to resolve a conflict between the circuits.

The opinion in this case conflicts with *Keller v. Gilliam,* 454 F.2d 55 (5th Cir. 1972). *Keller* involved a plan for the election of the five-person Board of Supervisors for Lowndes County, Mississippi. Under that plan, the county was divided into five districts. Elections were held at large, but each of the five supervisors had to be a resident of a different district. As in *McCain:* (1) the districts were of unequal population;[5] (2) a minority of the population could combine to dominate the council;[6] and, (3) no compelling need for the plan had been demonstrated. The fifth circuit, as did the court below, relied upon *Dusch v. Davis,* 387 U.S. 112 (1967). The two circuits, however, reached

[5] In *Keller* the three smallest districts contained 27.3% of the population of the county, while the deviation from largest to smallest district was 24,849 to 2,213 people.

[6] The district court found as a matter of fact that three of the five seats on Edgefield County Council would be held by members coming from residential districts containing only 44 percent of the county's population. The court of appeals said anomalously that "[i]t is not obvious that a minority, either in numbers or economic interest, can dominate the Board." Appendix, *infra* p. 10a. Aside from the fact that it *is* obvious that a minority in numbers can dominate the board, the finding of the district court was not found to be clearly erroneous.

opposite results. *Dusch* upheld the constitutionality of a plan of the City of Virginia Beach, Virginia, to elect a city council composed of eleven members elected by at-large voting, seven of whom were required to reside in each of the city's seven boroughs, and four of whom were elected without regard to residency. Though the boroughs in *Dusch* ranged in size from 733 to 29,048, this Court recognized in its opinion that the apportionment was designed to deal with the peculiar exigencies created by the consolidation of the City of Virginia Beach with Princess Anne County. The result of this consolidation was one of the largest area-wide cities in the United States, a city containing both populous areas and areas which were barely inhabited. In light of the dramatic transformation taking place in the nature of the City of Virginia Beach government, this Court cited with approval the conclusion of the district court that the plan demonstrated "the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wide cities in the United States." 387 U.S. at 116. *Keller* concluded that *Forison v. Dorsey*, 379 U.S. 433 (1965) presupposed "*equally* populated districts" when it approved a multi-member district with at-large voting scheme for election of state senators in Georgia, and that *Dusch* by its express terms approved deviations in residential district population only if there was protection against minority domination and there was a compelling need for the apportionment.[7] Since these conditions were not met in *Keller*, that court struck down the apportionment plan for election of the Lowndes County Board of Supervisors. The Fourth Circuit, however, read *Dusch* as authoriz-

[7] 454 F.2d at 56-57 (emphasis in original).

ing an opposite result in the present and analogous case. A conflict between the Fourth and Fifth Circuits as to the proper application of *Dusch* is apparent.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1619

ROBERT LYTLE,

Appellee,

- versus -

COMMISSIONERS OF ELECTION
OF UNION COUNTY, et al.,

Appellants.

AND

THOMAS C. McCAIN, et al.,

Appellees,

- versus -

CHARLES E. LYBRAND, et al.,

Appellants.

Appeal from the United States District Court for the District of South Carolina, at Spartanburg and Greenwood.
Sol Blatt, Jr., District Judge.

Argued: June 4, 1974 Decided: June 17, 1974

Before CRAVEN, RUSSELL and FIELD, Circuit Judges.

PER CURIAM:

The plaintiffs in these two cases challenge the constitutional validity of the statutory provisions for the election of the members of the Boards of Control [1] of Union and Edgefield Counties, South Carolina.[2] In both Counties the members of these governing Boards are elected at large but each member must reside in separate fixed districts of the County. The districts vary in population—substantially so in Union County—and in classification between urban and rural. Because both actions involved the same legal principles, they were consolidated for hearing and were disposed of in a single decree in the District Court and have been heard in this Court together.

In its decree, the District Court held that, since the several districts in the two Counties were "of unequal proportion" in population and "finding neither rational nor compelling circumstances justifying the formation of the unequally populated districts", the residency requirements for members of the two Boards were "violative of the 'one-man, one-vote' principle and are constitutionally unacceptable." It granted the Counties until May 1, 1975 to enact a plan for the election of the members of the two Boards that would comply with the constitutional standards as it had stated them and ordered by way of temporary relief that the nom-

[1] The Board of Township Commissioners and County Supervisor constitute "the governing board of Union County." §14-3464, Code of Laws of South Carolina, 1962, as amended by 52 Stat. Act No. 860 at 2152 (1962).

The County Council is the governing body of Edgefield County. 57 Stat. Act No. 521 at 989 (1971).

[2] 338 S. C. Joint Acts and Resolutions 555, as amended; and 14-1850, Code of Laws of South Carolina, 1962, as amended.

ination and election of such members for the currently slated 1974 election be at large without any residency requirements. In order to make effective this latter remedy, it ordered reopened the filing date of candidates for nomination in the party primaries to be held on July 16, 1974.

The defendants have appealed and, in connection therewith, have sought from the District Court a stay of its order pending disposition on the merits. When that application was denied, they applied to this Court for a stay under Rule 8(a), F.R.A.P. At the hearing on the motion to stay, it was agreed that the motion for a stay and a hearing of the appeal on the merits could be appropriately heard together and a determination on the merits would be dispositive of the motion to stay. We proceed accordingly to a consideration of the merits of the controversy.

The Supreme Court has not decreed absolute rigidity in the application of the "one-man, one-vote" rule as enunciated in *Wesberry v. Sanders* (1964) 376 U.S. 1, and succeeding cases, to elections to public office at all levels of federal and state government. In congressional elections, for instance, "only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown" are constitutionally permissible. *Kirkpatrick v. Preisler* (1969) 394 U.S. 526 at 531. Recognizing that such a rule of equal representation could not be automatically applied to local government, and, if applied, might "impair the normal functioning of state and local governments", the Court substantially relaxed the rule of mathematical exactness for the election of state legislators in *Mahan v.*

Howell (1973) 410 U.S. 315, at 323. In so doing, it accepted the argument that "maintaining the integrity of political subdivision lines" in such elections "is a rational one" and will justify some departure from the rule adopted in *Preisler* of congressional elections.[3] The "absolute rule" of *Preisler* has been even further relaxed by the Court in its review of the constitutionality of representational structures at the strictly local governmental level, such as is involved in this case. *Cf., Salyer Land Co. v. Tulare Water District* (1973) 410 U.S. 719. In these circumstances it was accepted that "each citizen's constitutional right to equal representation must be reconciled with the need for flexibility in designing local structures." Note, *72 Mich. L. Rev.* 869 (1974). Accordingly, in *Dusch v. Davis* (1967) 387 U.S. 112, it was held that local government officials elected at large may validly be required to be residents of particular areas or districts within the local governmental unit, even though such areas or districts have wide populational variances. Such decision recognized the wisdom of creating an institutional framework of local government that would assure "that councilmen with knowledge of the particular problems of each of the heterogeneous boroughs would be serving on the council." Note, 81 *Harv. L. Rev.* 154. And, because the local unit had a mixed economic base, the guaranty of regional representation under a system of equal voting represented "a sound compromise between urban and rural interests at the local level" [4] and, just as the

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[3] 410 U.S. at 329.

[4] 81 *Harv. L. Rev.* 155.

This idea was expressed by the Court itself in these words [387 U.S. at 117]:

"The Seven-Four Plan seems to reflect a detente be-

maintenance of "the integrity of political subdivision lines" provided a rational basis for the population variances in *Mahan*, so this attempt to balance urban and rural interests provided a rational basis for the addition of the residence requirement for candidates under a plan of at-large voting. Such a plan does not violate the rationale of the "one-man, one-vote" cases. Its residence requirement constitutes only a basis for qualification of candidates, not for voting or representation.[5] What it seeks is the avoidance of that "uniform straitjacket * * * in devising mechanisms of local government suitable for local needs and efficient in solving local problems", deplored in *Avery*.[6] As a matter of fact, the members, elected at-large, are answerable to and are representative of the entire constituency. The value of the residency provision, though, is that it provides an additional mechanism whereby territorial interests may be articulated through a representative who, though elected by the voters of the County as a whole, has a unique awareness and understanding of the problems and interest of the subdivision. This

tween urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside."

[5] For a recent statement of the value of the residency requirement in situations such as is present here, *see* Bilzin, *Reapportionment in the Sub-State Level of Government: Equal Representation or Equal Vote*, 50 *Boston U.L. Rev.* 231, 251:

"The problems involved in creating effective representation involve more than merely shifting numbers; the use of techniques such as residency requirements may prove beneficial. Members elected under this type of requirement tend to be men of broader backgrounds, more accessible to their constituencies, better informed and more sensitive to the needs of the various districts than those who are not."

[6] *Avery v. Midland County, Texas* (1968) 390 U.S. 474 at 485.

is a legitimate interest to be considered in fashioning a plan of local government.

Of course, there are limits to this electoral flexibility for local governmental units. When the residential areas are so drawn as to make it possible for the minority in numbers, whether it be urban or rural, to control the governing board, such an arrangement will transcend the constitutional bounds authorized under *Dusch*. The heart of *Dusch* is its approval of a "rational" balancing of interests, with appropriate regard for the distribution of population, in the constituency of the local governing board. It assumes the fairness of a scheme that allows some force to territorial interests, but at the same time it requires that the accommodation of territorial interests shall not nullify what are the proper rights of the majority in population. Accordingly, if the plan of election arbitrarily overbalances rural over urban or *vice versa*, judicial remedy is available. It was because of such a situation that an earlier plan involving the governmental unit in *Dusch* was judicially disapproved and the "Seven-Four" plan was devised.

The plaintiffs assert that any plan that detracts in any particular from an absolute rule both for voting and for residence of candidates is invalid. In the context of fixing the structures of local governmental units there may be relaxation of the absolute rule, if the reason therefor is as stated in *Mahan*, "rational". An attempt through a residency requirement to strike a balance between the interests of the rural and urban areas in a county, provided voting rights for both areas are protected by at-large elections, meets the "rational" test. The plaintiffs, however, argue that if the defen-

dants wish to support the residency requirement by this type of balancing, they are obligated to assert such claim affirmatively in their pleadings and to sustain it with proof. They contend the defendants have made no such affirmative showing. However, it is obvious from an official map of the two counties and the listing of the populations in the several districts of the political units that there are urban and rural areas fairly well defined in the counties involved. Thus, Union district, with over 58% of the County's population qualifies as an urban area; similarly, Goshen Hill district, with a population of 561, would be fairly characterized as agricultural. These are merely common-sense deductions from admitted facts. It thus takes no elaborate record to establish what is so manifestly obvious and what is actually inherent in the plaintiffs' own argument; *i.e.*, that the several plans deal with and seek to establish some sort of accommodation between urban and rural interests. *Dusch* declares such an attempt at adjustment between varying interests in a local unit is "rational" and valid.

It remains to ascertain whether the residential requirements for representation as devised in the statutes under review represent a proper constitutional balance of these urban and rural interests. To determine this, we must examine the workings of the plan in each county separately. So examined, we conclude the plan followed in Union County will not meet constitutional standards. There is no "Seven-Four" plan here such as there was in *Dusch*. The urban area as represented by the Union district, with, as we have observed, 58% of the County's population, is entitled to but a single resident member on the eight-man Board. Stated more

particularly, Union District, with a population of 17,127, and Goshen Hill District, with a population of 561, would, under the statute challenged, have the same residential representation on the Board of County Control. There are no "floating" members as in *Dusch* to compensate for the very substantial variations in population among the districts. The District Court properly, therefore, found under these circumstances that the statutory plan of selection in Union County was invalid.

It does not follow, however, that, because the present statutory scheme in Union County is invalid, the proper temporary or transitional remedy is the complete invalidation of the residence requirement for the approaching election, while affording the legislature an opportunity to develop its own plan between now and 1975. After all, there is an obligation on the Court to fashion even its transitional remedy by taking into consideration what obviously was the legislative purpose in devising the plan it did and to depart as little from that purpose as constitutional principles will permit. To strike down completely all residence requirements would mean that the urban area of Union could completely dominate and control the Board, leaving the rural areas of the County without any representative to voice their peculiar and unique territorial interests. That was a result the legislature manifestly sought to avoid. In decreeing transitional relief, the Court should not disregard that legislative purpose. Accordingly, the remedy adopted should be one that recognizes and gives proper effect to the population variances among the districts as well as the economic differences among them. It was the virtue of the *Dusch*

plan that it did exactly that. It accomplished that result by requiring a number of "floater" representatives, without any residence requirements, while retaining a certain number of representatives with residence requirements. Under the plan, the urban areas, which represented the majority in population, could conceivably achieve a numerical majority on the Board but the rural areas, despite their minority in population, were assured reasonable representation for the representation of their interests on the Board. That, it seems to us, should be the transitional remedy ordered in the Union case. A "Four-Four" plan is readily adaptable to the situation and will achieve the same kind of fairness as resulted from the plan approved in *Dusch*. Specifically, four members of the Board would be nominated and elected without residence requirements and four would be elected with residence requirements. The resident requirement for the latter four would contemplate that the eight districts in the County should be grouped by combining two districts and by providing that each such group of two districts should be entitled to have as a member of the Board one of its residents, elected, of course, by the voters of the entire County. In making the groupings, the most populous district might first be coupled with the least populous, and in the subsequent groupings, the same procedure of joining the most populous district then remaining with the least populous would be followed. This is purely a suggestion and the parties are at liberty to submit any alternative plan to the District Court that may be deemed consonant with the principles set forth herein, provided they act promptly and do not delay unduly the electoral processes.

This remedy, it should be observed, is only decreed for the approaching election. It is not intended to be a permanent plan for the election of the members of the Board. A permanent plan should be a legislative responsibility and only in default of any valid legislative action should the judiciary interfere. It should be remarked, too, that there is no claim of any racial discrimination claimed to result from the present statutory plan.

As a result of our modification of the plan adopted by the District Court for the approaching election, it will be necessary to provide for the reopening of the election machinery for the election of members of this Board in Union County. To the end that this may be done promptly and expeditiously, this cause will be remanded to the District Court to enter such administrative orders as may be appropriate and, in order that such Court may not be delayed in discharging this responsibility, the mandate herein shall issue forthwith.

So far, we have dealt only with the Union County plan. We are of the opinion that the Edgefield County plan, as presently provided by statute, represents a proper balancing of interests and without such population variances among the districts as to require the deletion on constitutional grounds of the residence requirements imposed by the statute under attack. There is not the wide disparity in population among the districts as was the case in Union County. It is not obvious that a minority, either in numbers or in territorial or economic interest, can dominate the Board. The several districts are of sufficient size and numbers that a residence requirement does not appear to be an irrational method of achieving a form of county gov-

ernment, elected by all the voters of the County but, through its residence requirement, assuming some attention to territorial interests. We conclude, therefore, that the District Court was in error in invalidating the statutory election procedure for the members of the Edgefield County Board.

The decree of the District Court invalidating the statutory provisions for the election of members of the governing board of Union County is accordingly affirmed, but the transitional remedy for use at the current election of members of such Board is reversed, and the cause is remanded to the District Court with directions for the entry of an order for transitional or temporary relief as hereinbefore stated.

The decree of the District Court invalidating the statutory provisions governing the election of members of the Edgefield County Council is reversed.

AFFIRMED IN PART AND
REVERSED IN PART.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

CIVIL ACTION FILE NO. 74-281

THOMAS C. McCAIN,
ERNEST WILLIAMS, AND
WILLIAM SPENCER, ETC.
vs.
CHARLES E. LYBRAND, ET AL.

JUDGMENT

This action came on for hearing before the Court, Honorable Sol Blatt, Jr., United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that summary judgment is hereby entered for the plaintiffs as to the first cause of action only.

Dated at Columbia, South Carolina, this 16th day of May, 1974.

MILLER C. FOSTER, JR.
Clerk of Court

/s/ By: MARGARET TRUESDALE
MARGARET TRUESDALE
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

ROBERT LYTLE, *Plaintiff,* -v- COMMISSIONERS OF ELECTION OF UNION COUNTY, namely: COMMISSIONER JOE WIX, COMMISSIONER WALTER VANDERFORD, COMMISSIONER HOWARD NELSON, COMMISSIONER WILBUR HODGE, COMMISSIONER BOBBY MANGUM and the UNION COUNTY DELEGATION, REPRESENTATIVE JAMES ARTHUR, SENATOR JOHN D. LONG and SENATOR ROBERT BLAKE, and the UNION COUNTY COMMISSIONERS, *Defendants.*	Civil Action No. 74-237 ORDER

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

THOMAS C. McCAIN, ERNEST WILLIAMS, and WILLIAM SPENCER, individually and on behalf of all those similarly situated, *Plaintiffs,* -v- CHARLES E. LYBRAND, GENE HUIET, HENRY M. HERLONG, ROY A. HARLING, and W. T. TIMMERMAN, individually and as members of the County Council of Edgefield County; NORMAN DORN, JOHN S. EDWARDS, and RICHARD A. BEALS, individually and as members of the Board of Election Commissioners of Edgefield County, South Carolina; and J. M. PENDARVIS, individually and as President of the Executive Committee of the Democratic Party of Edgefield County, *Defendants.*	Civil Action No. 74-281 ORDER

In the above entitled actions, which are generally cognizable under 42 U.S.C., Section 1983, the plaintiffs seek a reapportionment of the eight-member Township Commission—(Union County, C/A 74-237)—and the five-member County Council—(Edgefield County, C/A 74-281).

In Civil Action No. 74-237—(hereinafter "Union County")—the cause of action has its genesis in an Act passed by the South Carolina Legislature in 1939, establishing the Union County Township Commission system—(338 South Carolina Joint Acts and Resolu-

tions 555)—under which Act Union County was then divided into eight townships of varying area and population. As a result of amendments thereafter enacted, it is now mandatory that one member of the Commission be elected to represent each of the eight townships and that such member be a resident of the township from which he is elected. While each member must reside in a particular township, all members are elected "at large", that is, all of the voters of Union County select the members of the Commission, not the voters alone in the township represented by a particular Commissioner. The plaintiff attacks this system solely on the "one-man, one-vote" theory enunciated in many decisions of the United States Supreme Court, commencing with *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); and *Reynolds v. Sims*, 377 U.S. 533 (1964); to the more recent cases of *Avery v. Midland County, Texas*, 390 U.S. 474 (1968); and *Hadley v. Junior College District*, 397 U.S. 50 (1970).

It appears in "Union County" that there is a population deviation of at least 432 per cent from the smallest population township to the largest population township, and the plaintiff contends that 21 per cent of the people of Union County, this being the percentage of citizens who live in the five smallest population townships, elect and control five of the eight township Commissioners and that any election scheme which allows such a result constitutes an invidious discrimination against those citizens who comprise the greater part of the electorate but are represented by a minority of the governing board. The plaintiff in "Union County" seeks a declaratory judgment holding the present sys-

tem of election of Union County Township Commissioners to be violative of the rights of the plaintiff and others similarly situated, and he seeks an Order from this court delaying the election of Township Commissioners in the oncoming primary elections, now scheduled for July 16, 1974, and in the general election scheduled for November, 1974, until an appropriate reapportionment plan has been implemented which complies with the "one-man, one-vote" edict of the Supreme Court, said plan to be devised by this court, or effectuated by action of the General Assembly of South Carolina with approval of the United States Department of Justice under the provisions of the 1965 Voting Rights Act.

In Civil Action No. 74-281—(hereinafter, "Edgefield County")—the cause of action arises from an Act of the South Carolina Legislature passed originally in 1966 and amended in 1971—(§14-1850 of the 1962 Code of Laws of South Carolina, as amended)—establishing the Edgefield County Council, under which Act Edgefield County was divided into five districts of varying area and population, with the identical residency requirement and "at-large" voting method as that under attack in the "Union County" case. "Edgefield County" differs in two factual respects from "Union County" insofar as population is concerned in that the maximum population deviation in the districts is only 72 per cent, and approximately 44 per cent of the population is required to elect three of the five Councilmen. Additionally, the plaintiffs in "Edgefield County" attack not only violation of the "one-man, one-vote" principle, as does the plaintiff in "Union County", but the plaintiffs in "Edgefield County", all being black

citizens of that county, contend that the election scheme there discriminates against them and other black citizens on account of their race. These plaintiffs seek substantially the same relief as that sought by the plaintiff in "Union County."

Focusing attention first on the "one-man, one-vote" principle under attack in both cases, the plaintiffs and the defendants move for summary judgment on this issue in each case under Rule 56 of the Federal Rules of Civil Procedure, and all parties have filed the necessary affidavits and supporting data upon which to base their respective motions.

Election plans based on "at-large" voting with residency clauses, such as are here involved, have been reviewed by various courts; but very few courts have faced the exact issues raised in the instant cases. The first case of consequence in this field was *Fortson v. Dorsey*, 379 U.S. 433 (1965), in which the United States Supreme Court upheld the use of an electoral system that combined multi-member districts and residency requirements, which system was used in the election of state senators in the State of Georgia. In that case, *there was no substantial population deviation in the senatorial districts involved*, and the Supreme Court stated, in upholding the residency requirement applicable to the large multi-district counties, beginning at page 436 of 379 U.S.:

> "It is not contended that there is not 'substantial equality of population' among the 54 senatorial districts. The equal protection argument is focused solely upon the question whether county-wide voting in the seven multi-district counties results in denying the residents therein a vote 'approximately

equal in weight to that of' voters resident in the single-member constituencies. Contrary to the District Court, we cannot say that it does. There is clearly no mathematical disparity. Fulton County, the State's largest constituency, has a population nearly seven times larger than that of a single-district constituency and for that reason elects seven senators. Every Fulton County voter, therefore, may vote for seven senators to represent his interests in the legislature. But the appellees assert that this scheme is defective because county-wide voting in multi-district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted. But this is only a highly hypothetical assertion that, in any event, ignores the practical realities of representation in a multi-member constituency. It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator. If the weight of the vote of any voter in a Fulton County district, when he votes for seven senators to represent him in the Georgia Senate, is not the exact equivalent of that of a resident of a single-member constituency, we cannot say that his vote is not 'approximately equal in weight to that of any other citizen in the State'." *Fortson*, at 436, 437, 438.

Two years following the *Fortson* decision, the United

States Supreme Court was faced with a relatively similar situation in *Dusch v. Davis*, 387 U.S. 112 (1967). In the *Dusch* case, the Supreme Court was confronted with an election scheme analogous to that in *Fortson* and the instant cases. The City of Virginia Beach, Virginia, consolidated with adjoining Princess Anne County, which merger resulted in a combination of rural and urban areas, and a borough form of government was adopted. Under this plan, the new City of Virginia Beach, voting "at-large", elected eleven councilmen, seven of whom were required to reside in each of the city's seven boroughs, and four of whom were elected without regard to residency. Since the population of the seven boroughs ranged in number from 733 to 29,048 persons, this "Seven-Four Plan", as it was denominated, was attacked as violative of the "one-man, one-vote" concept. The Supreme Court, however, found the plan comparable to the scheme approved in *Fortson*, supra, and held that this "Seven-Four Plan" did not constitute "invidious discrimination."

> "The Seven-Four Plan makes no distinction on the basis of race, creed, or economic status or location. Each of the 11 councilmen is elected by a vote of all the electors in the city. The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal. In upholding a residence requirement for the election of state senators from a multi-district county we said in *Fortson v. Dorsey*, 379 U.S. 433, 438:
>
> > 'It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence

> for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.'

"By analogy the present consolidation plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' He is nonetheless the city's, not the borough's, councilman. In *Fortson* there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow. But on the assumption that *Reynolds v. Sims* controls, the constitutional test under the Equal Protection Clause is whether there is an 'invidious' discrimination. 377 U.S., at 561. As stated by the District Court:

> 'The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area.'
>
> * * * *
>
> '(T)he history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wide cities in

> the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster.'
>
> "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside. Finding no invidious discrimination we conclude that the judgment of the Court of Appeals must be and is *Reversed*." *Dusch*, at 115, 116, 117.

The defendants here contend that, in approving this "Seven-Four Plan", the Supreme Court gave its blessing to a scheme of operation with a maximum population deviation exceeding 365 per cent and these defendants urge that *Dusch* permits wide variances in population among districts within a political entity when the election process, even with residency requirements, involves at-large elections and when there are valid, non-invidi-

ous reasons for the formation of the particular residential districts. Thus, these defendants insist that the residency provisions of the Edgefield County and Union County plans are not unconstitutional under the "one-man, one-vote" mandate.

Following *Fortson* and *Dusch*, the United States Supreme Court decided *Hadley v. Junior College District*, 397 U.S. 50 (1970), a case in which eight school districts in Kansas City, Missouri, combined to establish a consolidated Junior College District and to elect six trustees to conduct and manage the affairs of that district, a practice allowed under Missouri law. The trustees in this plan were required to be residents of the district from which they were elected and they were elected by the residents of their particular district, not under an at-large scheme. Because the plan discriminated in favor of certain of the smaller populated school districts, the Supreme Court held the plan to be unconstitutional and, in that connection, stated:

> "In this particular case, the 'one-man, one-vote' principle is to some extent already reflected in the Missouri statute. That act provides that if no one or more of the component school districts has 33⅓% or more of the total enumeration of the junior college district, then all six trustees are elected at large. If, however, one or more districts has between 33⅓% and 50% of the total enumeration, each such district elects two trustees and the rest are elected at large from the remaining districts. Similarly, if one district has between 50% and 66⅔% of the enumeration it elects three trustees, and if one district has more than 66⅔% it elects four trustees. This scheme thus allocates increasingly more trustees to large districts as they represent an increasing proportion of the total enumeration.

"Although the statutory scheme reflects to some extent a principle of equal voting power, it does so in a way that does not comport with constitutional requirements. This is so because the Act necessarily results in a systematic discrimination against voters in the more populous school districts. This discrimination occurs because whenever a large district's percentage of the total enumeration falls within a certain percentage range it is always allocated the number of trustees corresponding to the bottom of that range. Unless a particular large district has exactly 33⅓%, 50%, or 66⅔% of the total enumeration it will always have proportionally fewer trustees than the small districts. As has been pointed out, in the case of the Kansas City School District approximately 60% of the total enumeration entitles that district to only 50% of the trustees. Thus while voters in large school districts may frequently have less effective voting power than residents of small districts, they can never have more. Such built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's, as far as practicable. Consequently Missouri cannot allocate the junior college trustees according to the statutory formula employed in this case. We would be faced with a different question if the deviation from equal apportionment presented in this case resulted from a plan that did not contain a built-in bias in favor of small districts, but rather from the inherent mathematical complications in equally apportioning a small number of trustees among a limited number of component districts. We have said before that mathematical exactitude is not required, *Wesberry, supra*, at 18, *Reynolds, supra*, at 577, but a plan that does not automatically discriminate in favor of certain districts is.

> *"In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. We have previously upheld against constitutional challenge an election scheme that required that candidates be residents of certain districts that did not contain equal numbers of people. Dusch v. Davis,* 387 U.S. 112 (1967). *Since all the officials in that case were elected at large, the right of each voter was given equal treatment." Hadley* at 56, 57, 58. (emphasis ours).

Because of the approval in *Hadley* of the *Dusch* principle, the defendants in both "Union County" and "Edgefield County" urge that the election scheme in each instance meets the constitutional requirements established in *Dusch* and reaffirmed in *Hadley.*

Counsel for plaintiffs and defendants in both cases, and this court in conducting its independent research, have uncovered only three cases in which the factual situation is identical to the cases here under review; two of these cases, *Mays v. Teague,* 341 F.Supp. 254 (E.D. Tenn., 1972), and *Davis v. Thomas County,* 380 F.(2) 93 (5 Cir., 1967), support the argument advanced by the defendants, while the third case, *Keller v. Gilliam,* 454 F.(2) 55 (5 Cir., 1972), supports the argument of the plaintiffs.[1] In *Davis v. Thomas County,* in a brief opinion, the Court of Appeals for the Fifth Circuit, approved an election plan for the selection of eight members of the Board of Commissioners of Roads and

[1] *Twiggs v. West, et al.,* C/A Nos. 71-1106, 71-1123, and 71-1211 (D.C. S.C., 1971), involving the reapportionment of the State Senate of South Carolina, touches on but does not meet the issue here involved, and in *Dessauer, et al. v. England, et al.,* C/A 70-1076, (D.C. S.C., 1970), the issue confronting this court was apparently decided without controversy or contest.

Revenues of Thomas County, Georgia, in which this county was divided into five districts whose commissioners were chosen at-large but wherein, because of residence requirements, one district with a population of 20,492 people was represented by only two commissioners, while the remaining four districts, with a total population of only 13,827, were represented by six commissioners. In affirming the dismissal of the complaint in that case by the District Court, the Court of Appeals for the Fifth Circuit, at page 94 of 380 F.(2), held that such dismissal was clearly vindicated by the opinion of the United States Supreme Court in *Dusch*. Likewise, the United States District Court for the Eastern District of Tennessee in *Mays v. Teague*, upheld the constitutionality of a plan to elect a County Board of Education of seven members, one of whom was required to live in each of seven school districts, which varied in population from 450 to 2,353 people, but who were elected at-large by the entire county. The District Court, basing its holding on *Dusch* and *Fortson*, found the plan constitutionally acceptable and distinguished *Hadley* in that *Hadley* did not provide an "at-large" plan for voting. However, the District Court in *Mays* cited that part of *Hadley* reaffirming the principle of *Dusch*, as additional authority for its decision that the plan in *Mays* met constitutional muster.

In January, 1972, four and one-half years after the Fifth Circuit Court of Appeals opinion in *Davis*, and two months prior to the District Court's opinion in *Mays*, the Fifth Circuit Court of Appeals decided *Keller v. Gilliam*, which case, *on identical facts*, reversed the holding in *Davis* without ever mentioning *Davis* in the

opinion.[2] In *Keller*, the District Court, in fashioning a plan to replace a scheme that it had held to be unconstitutional involving the election of a Board of Supervisors for Lowndes County, Mississippi, divided the county into five districts and directed that the new Board of Supervisors be elected at-large with the requirement that each elected supervisor be a resident of one of the five districts. Three of these districts contained only 27.3 per cent of the population of the county and, thus, a majority of the Board would represent a small minority of the residents of Lowndes County. Furthermore, the population variance from the largest to the smallest district was 24,849 to 2,213 persons. In rejecting this plan of the District Court, the Court of Appeals for the Fifth Circuit adopted the view that the principles enunciated in *Fortson* and *Dusch*, so strongly relied upon by the defendants here, must be read within the factual setting peculiar to those two cases.

> "It must be borne in mind that we do not have here a case in which a number of candidates are to be chosen from several *equally* populated districts but are to be voted on by all of the voters of the governmental body, such as was dealt with in the statement of the Supreme Court in *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.(2) 401 (1965). The court found no cause for criticism of an at large vote by all of the electors of a county for more than one senator, so long as one senator was required to stand for election from each of the separate districts. No attack was made in

[2] Oddly enough, the District Court in *Mays* did not cite in its opinion either *Davis* or *Keller*, a readily understandable fact in view of the confusion created by these two entirely different decisions from the Fifth Circuit on an identical factual matter.

Fortson v. Dorsey on the equality of the population of the different districts.

"Neither do we have a case similar to *Dusch v. Davis*, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.(2) 656 (1967), where there was a city council election in the newly consolidated city of Virginia Beach (formerly consisting of the city of Virginia Beach and all of the rest of Princess Ann[e] County, Virginia) under what was known as the 'seven-four plan.' This plan required that there should be an eleven man council to be elected at large by all the voters in the city's seven boroughs; four of the councilmen could reside anywhere in the city, but each of the other seven had to live in a different one of the seven boroughs. These boroughs range in population from several hundred to 38,000 in size. The Supreme Court reversed the action of the Court of Appeals for the Fourth Circuit, which had held the plan was contrary to the 'true thrust' of the 'one-man, one-vote' principle of *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.(2) 506 (1964) and 'its kin.'

"What was clear in the Virginia Beach (*Dusch*) case is that there was no combination by which representatives residing in the districts comprising a minority of the population could combine to work their will over the majority residing in the heavier populated precincts, except with the concurrence of some of the four councilmen who could reside in any of the boroughs and who were elected at large. Quite the contrary is obviously true here. The three smallest (coincidentally, also rural, as distinguished from urban) districts have a total population of just over 22% of the county. Thus, the three supervisors resident in them can prevail in any vote of a five-member Board. The other two supervisors who reside in the remaining two districts could not prevail on any Board vote, al-

though possessing nearly three-fourths of the population of the county.

"We note that the Supreme Court drew attention to this special circumstance by quoting from the decision of the district court, which had approved the plan. 'The plan does not preserve any controlling influence of the smaller boroughs . . .' Moreover, in footnote 5 the court says, 'It is obvious that, if the percentage of qualified voters is in accord with the population, Lynnhaven and Bayside (the two most populous boroughs), if united in their efforts, could elect all 11 councilmen even though the election were at large.' It is equally true that Lynnhaven and Bayside, either with or without Kempsville (another populous borough) could elect a clear majority of the councilmen by adding their three to the four to be chosen at large. Thus, it is clear, that there was no opportunity in the Virginia City case for the thinly populated rural area to dominate the council as against the three or four predominately urban areas under the 'seven-four plan.'

"It is also significant that the court noted the finding by the district court to the effect that 'the history—past and present—of the area and population now comprising the city of Virginia Beach demonstrates the compelling need, *at least during an appreciable transition period*, for knowledge of rural problems and handling the affairs of one of the largest area-wide cities in the United States.' (emphasis added) It will be noted that the offices which are involved in the case before us here are the offices of county supervisors, the responsibilities of which have in no wise changed over the years. The supervisors continue to handle the county affairs involving both rural and urban areas." 454 F.(2) 56, 57.

This court, faced with a choice between the decisions

in *Davis* and *Mays* on the one hand, and *Keller* on the other, adopts the logic and reasoning advanced by the *Keller* court. Finding the population districts in Union County and Edgefield County of unequal proportion—(substantial equality being the basis for the approval of the plan in *Fortson*)—and finding neither rational nor compelling circumstances justifying the formation of the unequally populated districts—(such rational and compelling circumstances being the basis for the approval of the plan in *Dusch*)—this court is of the opinion that the residency provisions of the plans here involved are violative of the "one-man, one-vote" principle and are constitutionally unacceptable.

> "(I)n holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the states will be inhibited in finding ways to insure that *legitimate political goals of representation is achieved.*" 397 U.S. 50, at 58. (emphasis ours)

"Legitimate political goals", if such existed in these cases, would lend support to the position of the defendants, but finding no such "goals" from the affidavits and supporting data submitted by the defendants, this court finds the rationale of *Keller* unanswerable, and the residency provisions in the two election plans under consideration unacceptable.

Because of the relief hereinafter provided, this court does not feel it appropriate or necessary at this time to reach the second contention advanced in "Edgefield County", that of racial discrimination, and, thus, purposely makes no finding on that issue in this Order.

Based on the foregoing, it is

ORDERED, in Civil Action No. 74-237 (*Lytle v.*

Commissioners of Election of Union County, et al.), that summary judgment is hereby granted to the plaintiff, and the defendants therein are hereby enjoined from holding any further elections for Union County Township Commission pursuant to the residency provision contained in 338 South Carolina Joint Acts and Resolutions 555, as amended.

IT IS FURTHER ORDERED, in Civil Action No. 74-281, (*McCain, et al. v. Lybrand, et al.*), that summary judgment is hereby granted to the plaintiffs as to the first cause of action only, and defendants therein are hereby enjoined from holding any further elections for Edgefield County Council pursuant to the residency provision contained in §14-1850 of the 1962 Code of Laws of South Carolina, as amended.

IT IS FURTHER ORDERED, that the primary and general elections for the year 1974 as provided by law for Union County Township Commission and Edgefield County Council shall be conducted with all candidates running at-large on a county-wide basis with no township or district resident requirement imposed on any candidate.

IT IS FURTHER ORDERED, that the defendants in each of the above entitled cases shall give public notice in a newspaper of general circulation in each county for a period of two weeks after receipt of this Order that any person wishing to file as a candidate for Union County Township Commission or Edgefield County Council under the terms of this Order shall have that right between twelve o'clock noon on June 3, 1974, and twelve o'clock noon on June 17, 1974, and the defendants herein shall make provision

under applicable state law to accept such filings which might be made by any such candidates.

IT IS FURTHER ORDERED, to allow the defendants, if they be so advised, to seek reapportionment by legislative enactment, with approval of the Attorney General of the United States under the 1965 Voting Rights Act, rather than reapportionment by court edict, that the defendants shall present to this court on or before May 1, 1975, a plan for election of the Union County Township Commission and the Edgefield County Council which has been adopted by the South Carolina General Assembly, and approved by the Attorney General of the United States.

IT IS FURTHER ORDERED, if no legislatively enacted plan, approved by the Attorney General of the United States, is presented to this court by May 1, 1975, by the defendants, that this court shall at that time put into effect its own reapportionment plan after receiving suggested plans from both plaintiffs and defendants.

IT IS FURTHER ORDERED, that this court shall retain jurisdiction in each of these actions until constitutionally valid reapportionment plans for the Union County Township Commission and the Edgefield County Council have been adopted by the defendants through legislative action, and approved by the Attorney General of the United States, and by this court, or until such time as this court devises and effectuates its own reapportionment plan, and such jurisdiction is retained in these cases for all appropriate purposes, including, but not limited to, the awarding of attorneys' fees to

the successful parties if the same shall be proper in these circumstances.

/s/ SOL BLATT, JR.
SOL BLATT, JR.
United States District Judge

Charleston, South Carolina
May 15, 1974

TRUE COPY
Test:
MILLER C. FOSTER, JR.
Clerk

/s/ MARGARET TRUESDALE
By: Deputy Clerk

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I. The Edgefield County Council election plan represents a proper balancing of interests, without such population variance among the districts, as to require the deletion on constitutional grounds of the residence requirements imposed by State statute and does not violate the "one man, one vote" principle. 4

II. The Per Curiam Opinion of the Fourth Circuit Court of Appeals reversing the District Court's Order granting Summary Judgment is not a judgment or decree within the meaning of 28 U. S. C. § 1254(1) so as to render it a judgment ripe for review by the Supreme Court of the United States upon a Writ of Certiorari. 7

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upreme Court of the United States

OCTOBER TERM, 1974

No. .....

OMAS C. McCAIN, ERNEST WILLIAMS AND WIL-
LIAM SPENCER, INDIVIDUALLY AND ON BEHALF OF ALL
THOSE SIMILARLY SITUATED, PETITIONERS,

versus

ARLES E. LYBRAND, GENE HUIET, HENRY M.
HERLONG, ROY A. HARLING, AND W. T. TIM-
MERMAN, INDIVIDUALLY AND AS MEMBERS OF THE
COUNTY COUNCIL OF EDGEFIELD COUNTY; NORMAN
DORN, JOHN S. EDWARDS AND RICHARD A.
BEALS, INDIVIDUALLY AND AS MEMBERS OF THE BOARD
OF ELECTION COMMISSIONERS OF EDGEFIELD COUNTY,
SOUTH CAROLINA; AND J. M. PENDARVIS, INDIVIDU-
ALLY AND AS PRESIDENT OF THE EXECUTIVE COMMITTEE
OF THE DEMOCRATIC PARTY OF EDGEFIELD COUNTY, RE-
SPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals
the Fourth Circuit is unreported and is set out in Ap-
lix of Petition at 1a. The opinion of the District Court
. of Petition at 14a) is reported at 376 F. Supp. 304
C. S. C. 1974).

JURISDICTION

Respondents do not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I

Whether or not the Edgefield County Council election plan represents a proper balancing of interests, without such population variance among the districts, as to require the deletion on constitutional grounds, of the residence requirements imposed by State statute as a violation of the "one man, one vote" principle?

II

Whether or not the Per Curiam Opinion of the Fourth Circuit Court of Appeals reversing the District Court's Order granting Summary Judgment is a judgment or decree within the meaning of 28 U. S. C. § 1254(1) so as to make it a judgment ripe for review by the Supreme Court of the United States upon a Writ of Certiorari?

STATEMENT

Petitioners instituted the above-entitled action pursuant to 42 U. S. C. § 1983 seeking to have declared unconstitutional statutes which prescribe the method by which members of the County Council of Edgefield County, South Carolina, are elected.[1] This five-member County Council is the governing body of Edgefield County. The County is divided into five districts. Pursuant to 57 Stat. Act No. 521, § 2 (1971), the County Council is to be composed of

[1] In both the District and the Circuit Court, this case was heard with *Lytle v. Commissioners of Election of Union County*, Civil Action No. 74-237, reported at 376 F. Supp. 304 (D.C.S.C. 1974); Civil Action No. 74-1619, decided June 17, 1974, (4th Cir., 1974). The present Petition deals only with those portions of the Opinions concerning Edgefield County.

one resident councilman from each district with each councilman being elected by an at large vote of the qualified electors of the county.[2] The five districts vary somewhat in population as the following table, using voter registration figures, shows.[3]

Table I

District	*Voters*
1	1,578
2	913
3	1,576
4	844
5	758
Total	5,669

In the lower courts Petitioners contended that the residency requirement dilutes, in violation of the Equal Protection Clause of the Fourteenth Amendment, the votes of those persons who live in the more populous districts.

On May 16, 1974, the District Court entered an order granting summary judgment to the Petitioners in the *McCain* case as to their first cause of action only. In its order, the Court held unconstitutional the residency requirements for the Edgefield County Council and enjoined the operation of those requirements by directing that the councilmen in Edgefield County be elected at large without the imposition of the residency requirements upon any candidate. Respondents made application on May 17, 1974, before the District Court for a stay of its permanent injunctions con-

[2] "[T]he Edgefield County Council . . . shall be composed of five members. . . . One member . . . shall be elected by the county at large for each of the five districts of the county. . . ." 57 STAT. Act No. 521 § 2 at 990 (1971).

[3] Population figures cannot be accurately ascertained because census tracts do not coincide with voting precincts; however, Petitioners conceded below that voting registration figures provide a workable basis for discussing the "one man, one vote" principle. The figures contained in Table I were obtained from The South Carolina State Election Commission.

tained in its May 6, 1974, order pending appeal to the Fourth Circuit, which was denied by the District Court in an order dated May 22, 1974, filed on May 24, 1974. On May 31, 1974, however, upon motion of the Respondents, the Honorable Donald Russell, United States Circuit Judge, stayed the District Court's order during the pendency of Respondents' appeal.

On appeal to the Fourth Circuit, the District Court was reversed on June 17, 1974, with the Circuit Court finding that the Edgefield County plan represents a proper balancing of interests and does not result in an unconstitutional population variance. This Petition followed the Fourth Circuit's reversal of the District Court's Order granting Summary Judgment to the Petitioners.

ARGUMENT

I

The Edgefield County Council election plan represents a proper balancing of interest, without such population variance among the districts, as to require the deletion on constitutional grounds of the residence requirements imposed by State statute and does not violate the "one man, one vote" principle.

In *Dusch v. Davis,* 387 U. S. 112, 18 L. Ed. (2d) 656, 87 S. Ct. 1554 (1967) the Supreme Court of the United States approved an at large election plan for the City of Virginia Beach, Virginia, very similar to the election plan for the Edgefield County Council. The City of Virginia Beach consolidated with adjoining Princess Anne County, which possessed both rural and urban areas. The City charter was amended to provide for a borough form of government with four councilmen being elected at large without regard to residency and with seven be elected by the voters of the entire city, one being required to reside

in each of the City's seven boroughs. The variance in the population of the seven boroughs ranges from a low of 733 to 29,048.

> In upholding this voting plan, the Court observed: The Seven-Four Plan makes no distinction on the basis of race, creed, or economic status or location. Each of the 11 councilmen is elected by the vote of all the electors in the city. The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal. . . .
>
> [T]he present consolidation plan uses boroughs in the city "merely as the basis of residence for candidates, not for voting or representation." He is nonetheless the city's, not the borough's councilman. 18 L. Ed. (2d) at 659.

Like the councilmen for Virginia Beach, the five councilmen for Edgefield County are elected by an at large vote of all the county electors. The Edgefield plan makes no distinction on the basis of race, creed, or economic status **or location**. The Edgefield plan uses districts of varying populations merely as a basis of residence, not as a basis for voting or representation.

The Court in *Dusch* drew an analogy between the residence requirements for the elections of state senators for a multi-district county upheld in *Fortson v. Dorsey*, 379 U. S. 433, 13 L. Ed. (2d) 401, 85 S. Ct. 498 (1965), and the Virginia Beach borough plan. In *Fortson* the Court stated:

> It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve

> the interests of all the people in the county, and not merely those of people in his home district; thus, in fact he is the county's and not merely the district's senator. 13 L. Ed. (2d) 401 at 404-405.

As in *Fortson* and *Dusch,* the tenure of the councilmen of Edgefield County depends upon the county-wide electorate. Consequently, an Edgefield County councilman must serve the interests of all the people of the county and is, therefore, the county's councilman and not merely the councilman for the district in which he resides.

Finally, in *Dusch* the Supreme Court spoke in terms of the Virginia Beach plan not preserving any "controlling influence" of the smaller boroughs.

> The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. 18 L. Ed. (2d) at 660.

The Court elaborated upon the meaning of the term "controlling influence" in a footnote.

> It is obvious that, if the percentage of qualified voters is in accord with the population, Lynnhaven and Bayside [the two most populous borough], if united in their efforts, could elect all 11 councilmen even though the election were at large. 18 L. Ed. (2d), footnote 5 at 660.

The footnote does not read: "6 of the 11 councilmen"; rather it reads: "all 11 councilmen" only because the election is at large within the voting unit.

Similarly, under the Edgefield County Council plan the electors of the two most popular districts, Districts 1 and 3, in the County can elect all 5 councilmen. According to the voter registration figures quoted *supra* at —, it is mathematically impossible for the electors of the 3 smaller

districts to combine forces to elect all or a majority of the council. Because all candidates are voted upon by the county-wide electorate, the voters of Districts Numbers 1 and 3 in Edgefield County can determine who, among all of the candidates, will be the members of the county governing body. Voters residing in the smaller districts do not possess that power. "Controlling influence" is in the majority of the voters in Edgefield County. Thus, the plan used in Edgefield as in *Dusch*, does not preserve any controlling influence in the smaller areas of residence because voting is at large within the election unit.

II

The Per Curiam Opinion of the Fourth Circuit Court of Appeals reversing the District Court's Order granting Summary Judgment is not a judgment or decree within the meaning of 28 U. S. C. § 1254(1) so as to render it a judgment ripe for review by the Supreme Court of the United States upon Writ of Certiorari.

Petitioner brought this Petition pursuant to 28 U. S. C. § 1254(1).[4] Ordinarily, the Supreme Court will not issue a writ of certiorari to review a decree of a circuit court of appeals from an interlocutory order;[5] however, the power of the Court to do so is clear[6] and that power will be exercised in extraordinary situations. *American Construction Company v. Jacksonville, Tampa and Key West Railway Company*, 148 U. S. 372, 37 L. Ed. 486, 13 S. Ct. 758 (1893).

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[4] 28 U.S.C. § 1254 (1) provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of *certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

[5] *See: Chicago and Northwestern Railway Co. v. Osborne*, 146 U. S. 354, 36 L. Ed. 1002, 13 S. Ct. 281 (1892).

[6] *See: The Conqueror*, 166 U. S. 110, 41 L. Ed. 937, 17 S. Ct. 510 (1897); *United States v. The Three Friends*, 166 U. S. 1, 41 L. Ed. 897, 17 S. Ct. 495 (1897).

The decree from which Petitioners seek review is a Per Curiam order reversing the District Court's Order granting Summary Judgment. Although the *McCain* case was not remanded to the District Court, it was not finally disposed of either by the Fourth Circuit or by the District Court and still has not been heard upon the merits in the District Court.

> The question whether a decree is an interlocutory or a final one is often nice and difficult, ... Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit becomes quite unimportant by reason of the final result. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. 37 L. Ed. at 491.

Respondents respectfully contend that this is not a case where such "extraordinary inconvenience and embarrassment" will result in the event the Petition is denied; therefore, the Court should not issue a Writ of Certiorari to review the decree of the Circuit Court in this action, which did nothing more than reverse the granting of Summary Judgment to the Petitioners.

CONCLUSION

For the foregoing reasons, Respondents submit that Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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